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JAMES H. McKENNEY,
Clerk.

No. 103.
Reply Brf. of Marshall for Appt.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 1, 1902.

No. 103.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant,

vs.

THE MONTANA ORE PURCHASING COMPANY, P. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF IN REPLY.

LOUIS MARSHALL,
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Appellant's Counsel.

C. D. Rosenfeld, Walker and Cedar Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 163.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Appellant,

AGAINST

MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,

Appellees.

APPELLANT'S BRIEF IN REPLY.

The appellees have moved (1) for a writ of *certiorari* for the amendment of the record, and (2) for the dismissal or affirmance of the appeal herein, the latter motion being based on three grounds :

FIRST. Because this appeal was not taken from the final judgment of the Circuit Court for the Ninth Circuit District of Montana.

SECOND. Because by this appeal it is sought to review the judgment of the United States Circuit Court of Appeals, Ninth Circuit. made and entered in this cause.

THIRD. Because there is no Federal question involved herein.

These several motions and the arguments made in support thereof by the appellees will now be considered.

FIRST.

The motion for a writ of certiorari.

(a) The appellees have not brought this motion within the rule of this Court regulating motions of this character.

The appeal herein was taken on March 15th, 1901, and the solicitors for the appellees on that day acknowledged service of copies of the assignments of error, petition of appeal, and citation on appeal (Record, pp. 52–56). The transcript of record herein was filed in this Court on May 21st, 1901, and the cause appeared on the docket of the October Term, 1901, as No. 329. The record was printed at about the opening of that term.

No motion of any kind was made or filed on behalf of the appellees for the amendment of the record until November 10th, 1902, after this cause had appeared on the docket of the present term, and on the very eve of the argument herein.

Rule 14, of the Rules of the Supreme Court, provides :

" No *certiorari* for diminution of the record will be hereafter awarded in any case unless a motion therefor shall be made in writing and the facts on which the same is founded shall, if not admitted by the other

party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted unless upon special cause shown to the court accounting satisfactorily for the delay."

The condition of this rule has not been complied with. No special cause is shown accounting for the delay. The affidavit of the solicitor for the appellees, upon which this motion is based, shows that at the time when the defendant presented its bill of exceptions—which was in March, 1901—the Court declined to include the mandate referred to in the affidavit, in the bill of exceptions, although the solicitor asserts that at the time he insisted and requested the Court to do so.

In *Chappell vs. United States (160 U. S., 506)*, Mr. Justice GRAY said of a similar motion:

"The motion for a writ of *certiorari* for diminution of the record in not stating that on July 15, 1890, the plaintiff in error filed a petition for the allowance of a writ of error from the Circuit Court of the United States to the District Court in which the proceedings were pending, must be denied for several reasons: 1st. The motion was not made at the First Term, as required by Rule 14 of this court, and no satisfactory cause is shown for the delay."

(b) The writ of mandate alone is not sufficient to indicate the nature of the appeal on the decision of which it was issued.

The writ, which constitutes a part of the moving papers, refers to an order for a temporary or interlocutory injunction, which is of record in the office of the Clerk of the Circuit Court of the United States for the District of Montana, Southern Division, "to which record reference is hereby made and the same is hereby

expressly made a part hereof." It also refers to the transcript of the record of the Circuit Court which was brought into the Circuit Court of Appeals for the Ninth Circuit.

In order, therefore, to understand the nature of the proceedings which resulted in the mandate, and the effect of the mandate, it is necessary to have before the Court the transcript of the record which was brought into the Circuit Court of Appeals and of the order for the temporary or interlocutory injunction, to which reference was made in and which were expressly made a part of the mandate. Without them the mandate is unintelligible and does not present to this Court sufficient facts on which to base any determination.

SECOND.

The Motion to Dismiss the Appeal.

(1) There is no merit in the proposition that the appeal herein is not taken from a final judgment of the Circuit Court for the Ninth Circuit, District of Montana.

(a) The record shows that on March 29, 1899, a decree was entered dismissing the amended bill, with costs to the defendants (Rec., p. 34).

(b) The certificate as to the existence of the question of jurisdiction shows that a decree was rendered by the Circuit Court of the United States for the Ninth Circuit dismissing the amended bill of complaint (Rec., pp. 35–51).

(c) The order allowing the appeal shows that such final decree was rendered (Rec., p. 54).

(11) There is no support for the claim that by this appeal it is sought to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, or that the decree of the Circuit Court dismissing the bill of complaint for want of jurisdiction is not reviewable.

(1) The record before this Court does not show that this appeal seeks to review any action of the United States Circuit Court of Appeals.

(2) On the contrary, the bill of exceptions and the certificate on the question of jurisdiction both show that the cause came on for hearing on the application of the defendant to dismiss this action, upon the ground and for the reason that there was no Federal question presented by the allegations in the plaintiff's amended complaint and the defendant's answer thereto, and that such application having been submitted to and duly considered by the Court, the Court rendered its decision sustaining the application to dismiss, upon the ground and for the reason that the Court had no jurisdiction of the action (Rec., pp. 34, 35).

(3) Assuming, however, that a mandate was issued by the United States Circuit Court of Appeals on the decision of an appeal by the defendants from an interlocutory injunction order, by the terms of which the order appealed from was reversed and the cause remanded to the Circuit Court with instructions to dismiss the amended bill for want of jurisdiction, that fact does not debar an appeal to this Court on the question of jurisdiction from the decree of the Circuit Court dismissing the action for want of jurisdiction.

(a) The appeal to the Circuit Court of Appeals was taken by the *defendants* herein and *not* by the *present appellant*, from an order granting the latter a temporary injunction. Such an appeal was proper for the purpose of reviewing the interlocutory order pursuant to the provisions of the *Evarts Act*, and on such an appeal that Court had the power to affirm or reverse the order appealed from. The present appellant could not have prevented the taking of such an appeal nor could it question the jurisdiction of the Circuit Court of Appeals to review the injunction order appealed from.

(b) It was not within the power of the present appellant on the granting of the temporary injunction to procure a review here of the jurisdictional question in this cause by a certification from the Circuit Court to this Court, because the injunction order was issued in its favor, and there was nothing, therefore, for this appellant to review; while the defendants could not be prevented from taking an appeal to the Circuit Court of Appeals in order there to review all the questions presented by the order granting the temporary injunction and by the record on which it was based.

(c) After the order of the Circuit Court of Appeals reversing the temporary injunction order had been granted the question of jurisdiction could not be certified from that Court to this Court, since the Evarts Act clearly refers to a certification by the Circuit Court alone. Neither could an appeal be taken to this Court from the order of reversal since it was not a final judgment or decree.

(d) Assuming that an application for a writ of *certiorari* might have been made to this Court for leave to review the order of the Circuit Court of Appeals reversing the temporary injunction, the granting of such

an application rested solely in the discretion of this Court, and, the question presented not being one of such a character as would have warranted the granting of a writ under the rules appertaining to applications therefor, which have been laid down by this Court, and the decision of the Circuit Court of Appeals being based on an interlocutory order, would unquestionably have been denied.

2 Foster's Fed. Pr., 3d ed. p. 1178.

(e) Unless, therefore, the question of jurisdiction arising in this cause can be reviewed on the certificate of the Circuit Court after a dismissal of the bill of complaint on the ground of want of jurisdiction subsequent to the reversal of the order granting the temporary injunction, the appellant would be deprived of the right to a review by this Court of the question of jurisdiction, although the underlying theory of the Evarts Act is to make all questions of jurisdiction the subject of review by this Court as of right to the exclusion of the Circuit Court of Appeals.

(f) This is not a case where the present appellant has sought to take two appeals for the purpose of obtaining adjudication on the question of jurisdiction involved in this cause. The appeal to the Circuit Court of Appeals was taken by defendants against the will of this appellant. The present appeal was taken by the appellant directly to this Court at the first opportunity that was presented to it to review the jurisdictional question involved.

(g) For these reasons the case does not fall within the rule of *Robinson vs. Caldwell (165 U. S., 359)* and *Carter vs. Roberts (177 U. S., 496)*. In both of those cases an attempt was made by the party defeated in

the Circuit Court to take independent appeals both to this Court and to the Circuit Court of Appeals. Such procedure was very properly criticised.

(h) Neither does this case fall within any of the classes considered in *United States vs. Jahn (155 U. S., 109, 114)*, in which the practice relative to the review of the jurisdiction of the Circuit Courts was considered. Such a situation as that which is here presented was not adverted to nor was it intended to define every possible category.

(i) Neither is the decision in *Howard vs. United States (184 U. S., 680)* applicable here. There an appeal was taken to this Court from a judgment of the Circuit Court of Appeals affirming a judgment of the Circuit Court. Jurisdiction was invoked both on the ground of diverse citizenship and on the existence of a Federal question. It was held that the judgment of the Circuit Court of Appeals was not "final" within the meaning of the *Evarts Act*, although it was a "final" judgment from which a writ of error could be sued out.

Here, there is no question as to the "finality" of the decision of the Circuit Court of Appeals within the meaning of the Evarts Act; but it requires no argument to show that the order of that Court reversing the injunction order herein and remanding the proceedings to the Circuit Court was not such a "final judgment or decree" as could be made the basis of a writ of error.

Keystone Manganese & Iron Co. vs. Martin, 132 U. S., 91, and cases cited.
American Construction Co. vs. Jacksonville Ry. Co., 148 U. S., 384, 385.

(j) This is not a case falling within the decision of

Aspen Mining & Smelting Co. vs. Billings (150 U. S., 31). There, after a final hearing on the pleadings in the Circuit Court of the United States for the District of Colorado, the bill of complaint was dismissed. An appeal was taken from the decree to the Circuit Court of Appeals, which reversed the decree of the Circuit Court and directed that Court to take further proceedings and to enter a decree in conformity with the opinion rendered. An application was made to this Court for a writ of *certiorari* under Section 6 of the Act of March 13, 1891, and was denied. Prior to the taking of the appeal to the Circuit Court of Appeals an appeal had been allowed to this Court, but subsequently on the prayer of the complainant and before the appeal had been perfected, an order was entered which vacated the allowance of an appeal to this Court and allowing an appeal to the Circuit Court of Appeals. After the reversal by the Circuit Court of Appeals the defendants objected to the jurisdiction of the Circuit Court to proceed further because of the previous vacated allowance of an appeal to this Court, and procured a certification of the question of the jurisdiction of the Circuit Court to proceed further in the cause.

Clearly that case does not present the same conditions as the present. There the complainant was the defeated party in the Circuit Court, and successful in the Circuit Court of Appeals in a case which undoubtedly could not have been taken directly to this court.

This is demonstrated by the opinions of the Circuit Court of Appeals in *51 Fed. Rep., 338*, and *52 Fed. Rep., 250*. They disclose that there was absolutely no question of jurisdiction in the case, and hence that it was

not one which could have been taken directly from the Circuit Court to this Court. That fact was emphasized by the application for a writ of *certiorari* after the decision by the Circuit Court of Appeals. The decree there appealed from was reversed and the cause remanded to the Circuit Court with instructions to permit another party to join as complainant, to require another party to be made defendant, and thereafter to enter a decree canceling certain deeds and directing an accounting between the parties.

When this Court came to consider the appeal which was taken to it, the merits and regularity of the procedure of the Circuit Court were passed upon. After a result had been reached adversely to the appellant, it was further decided that under the circumstances disclosed the decree of the Circuit Court in conformity with the mandate of the Circuit Court of Appeals was not reviewable here.

The differences between that case and the present are thus manifest. There, every issue in the case was reviewed by the Circuit Court of Appeals after final decree, and there was no question which was reviewable in this Court except as brought up by writ of *certiorari*, which, when applied for, was refused. Here the Circuit Court of Appeals had only jurisdiction to review the interlocutory injunction order, and unless this appeal is entertained the present appellant would be deprived of its statutory right to have the question of jurisdiction arising in this cause determined by this Court.

(k) The cases of *Stewart vs. Solomon (97 U. S., 360)*, *Texas & Pacific Ry. Co. vs. Anderson (149 U. S., 237)*, and *In re Sanford Fork & Tool Co. (160 U. S., 247)* have no application here. In each of them, after a

final decision by this Court and a remand to the Circuit Court, it was attempted to review the judgment of the Circuit Court in execution of a mandate of this Court by further appeal.

No such attempt is made here. What the appellant seeks to accomplish is to have his day in this Court on the question of jurisdiction, which he would lose, without any fault of his own, unless the question of jurisdiction certified by the Circuit Court is considered on this appeal.

III. *As has been shown in our main brief, a Federal question is involved herein which gave to the Circuit Court of the United States jurisdiction over this cause.*

Without repeating the argument contained in the brief heretofore filed on behalf of the appellant, a few of the statements made by the appellees will be briefly considered.

1. It is urged that treating this suit as one to quiet title, it is not maintainable, because the complainant did not allege that it was in possession of the premises in controversy.

(a) It may be premised that this appeal is not one which involves the question of the sufficiency of the bill of complaint as a pleading. It involves nothing but a question of jurisdiction, and its determination is solely on the proposition as to whether or not the statement of the complainants' case presents one or more Federal questions. Whether or not the pleading is good as a bill to quiet title is unimportant, so long as its purpose is to quiet the complainants' title.

(b) An examination of the bill of complaint will, however, indicate that as a bill to quiet title it is well pleaded.

It shows that the gravamen of its allegations are that the complainant is the owner and entitled to possession of certain premises described; that the defendants wrongfully entered upon and extracted ore therefrom which belonged to the complainant, and that unless the defendants are enjoined and restrained from mining and extracting the ores, the complainant would be required to bring numerous actions for the ascertainment of damages sustained, and would suffer irreparable injury; that the defendants claim to be the owners of the veins from which the ore had been extracted, and, therefore, the nature of their claims is described and the character of the Federal questions arising out of the controversy are defined.

The property which is the subject of this controversy is located in Montana. *Section 1310 of the Code of Civil Procedure* of that State provides:

"An action may be brought by *any* person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

While under the *Judiciary Act of 1789*, suits in equity are not maintainable in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law, it is an elementary principle that where a plaintiff complains of a trespass of a continuing nature so that redress at law would require a multiplicity of actions, the remedy at law would not be so adequate as that afforded by a court of equity.

Holland vs. Challen, 110 U. S., 15, 26.
United States vs. Wilson, 118 U. S., 689.
Frost vs. Spickley, 121 U. S., 552.

(c) Irrespective of the statutory provision of the Montana Code, the right to maintain an action of this character in order to prevent a multiplicity of suits, falls under one of the well recognized heads of equity jurisprudence, and has been recognized in many mining cases.

Erhardt vs. Boaro, 113 U. S., 537
Waterloo Mining Co. vs. Doe, 82 Fed, 45.

Jurisdiction over proceedings to quiet title and to prevent litigation is inherent in courts of equity, and although the courts have imposed limitations upon its exercise, it is always competent for the legislative power to remove these restrictions. Accordingly, it has been held that statutory enactments such as have been passed by Kentucky, Nebraska, Wisconsin and Indiana to the effect that any one, whether in actual possession or not, claiming title to real estate, may bring an action against any adverse claimant for the purpose of quieting his title, enlarge but do not change the character of the epuitable rights of persons claiming title to real property, and that a Federal Court sitting in such a State as a court of equity has jurisdiction to give the relief accorded by the statute.

Holland vs. Challen, 110 U. S., 15.
Reynolds vs. Crawfordsvile Bank, 112 U. S., 405.
Barden vs. Land & River Improvement Co., 157 U. S., 327.
Clark vs. Smith, 13 Peters, 195.

(d) Reading the bill of complaint according to its fair import, it is clear that the complainant showed that it was not only entitled to the possession of the premises on which the repeated trespasses were com-

mitted, but that it was in possession of such premises, the defendants' interference with such possession being restricted to their entry upon the premises described by underground workings (Rec., p. 4).

In *Simmons Creek Coal Co. vs. Doran, 142 U. S., 417*, it was held that the commission of a trespass on real estate and the commission of acts of waste upon it, do not constitute a possession which in itself would drive the owner to an action of ejectment and prevent him from filing a bill *quia timet.*

The case does not, therefore, fall within the principle of *California Oil & Gas Co. vs. Miller* (96 Fed. Rep., 12) and the other cases cited on pages 11 and 12 of the appellees' points.

2. The appellant does not question the authority of *Tennessee vs. Union and Planters Bank (152 U. S., 154), Blackburn vs. Portland Gold Mining Co. (175 U. S., 571)*, and the other authorities cited on pages 13-16 of the appellees' points.

The question here involved is not as to the rule of law, but as to whether the decisions referred to apply to the facts alleged in the bill of complaint; whether or not the statement of the appellant's cause of action presents a federal question.

3. It is not true that every question which could possibly arise under the issues raised by the pleadings was passed upon or determined by this Court prior to the filing of the amended complaint herein.

(a) The case of *Del Monte M. & M. Co. vs. Last Chance Mining Co. (171 U. S., 55)* was not decided until May 23, 1898. The amended bill of complaint herein was filed on March 28, 1898 (Rec., p. 1).

(b) The question as to the burden of proof in cases of trespass upon mining claims, which is discussed on

page 21 of the appellee's brief, is an open one in view of the decision of Judge KNOWLES in *Montana Co. vs. Clark (42 Fed. Rep., 626).*

(c) The effect of a divided apex is likewise an open question.

(d) The proposition considered in *Montana Ore Purchasing Co. vs. Boston & Montana Co., 20 Mont., 336,* and which is one of the important controversies between these parties, has never been passed upon by this Court.

4. The effect of the appellees' attempted disclaimer and of the decision in *Robinson vs. Anderson (121 U. S., 522)* has been sufficiently considered under the appellant's second point.

5. The criticisms upon the appellant's brief, which appear on pages 24–28 of the appellees' brief, are answered by the printed argument submitted by the latter to the United States Court of Appeals on the appeal the decision of which is reported in 85 Fed. Rep., at page 867.

Respectfully submitted,

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